

In the High Court of Judicature at Madras

Dated: 15/07/2003

C o r a m

The Honourable Mr. Justice P. SHANMUGAM
and
The Honourable Mrs. Justice R. BANUMATHI

Appeal Suit No.259 of 1987

The Commissioner,
H.R. & C.E.(A) Department,
Madras.34. .. Appellant

-Vs-

Arulmighu Arasadi Karpaga
Vinayagar Temple,
Triplicane, Madras-5
now its Trustee C.S.Mani Mudaliar .. Respondent

Prayer : Appeal suit filed against the judgment
and decree dated 16.4.1984 made in O.S.No.1677
of 1981 on the file of the XVII Assistant
Subordinate Judge, City Civil Court, Madras.

!For Appellant : Mr. G. Sukumar,
Spl. G.P. (H.R.& C.E.)

^For Respondent : Mr. K. Yamunan

:J U D G M E N T

P. SHANMUGAM, J.

The defendant in the suit is the appellant. In the plaint
filed under Section 70 of the Tamil Nadu Hindu Religious Act 22/59, his prayer
is for cancelling the orders of the Deputy Commissioner and Commissioner of
H.R. & C.E. dated 20.5.78 and 30.8.80 respectively and for declaring that
the temple is a private temple. The suit was decreed as prayed for. The
present appeal is filed by the Commissioner, H.R.& C.E.

2. The brief facts of the case are as follows :

The parties are referred to as per the ranking in the trial
Court.

The plaintiff, namely Arulmigu Arasadi Karpaga Vinayagar

Temple, represented by its hereditary Trustee C.S. Mani Mudaliar, has filed an application O.A. No.21 of 1976 under Section 63 (a) of Tamil Nadu H. R. & C.E. Act for a declaration that the temple in question is not a temple as defined under the Act before the Deputy Commissioner, who by an order dated 20.5.78, held that the temple is a public temple. According to him, the decision rendered in C.S.320/1912 dated 21.8.1914 has become final in establishing the public character of the temple and observed that the petition is only to prolong the misappropriation of the income of temple properties and ultimately dismissed the application, directing the proper authorities to take effective action to prevent further misappropriation of the temple funds and to make suitable arrangements by way of appointing an Executive Officer to set right the administration.

3. As against the order of the Deputy Commissioner, C.S. Mani Mudaliar filed an appeal in A.P.NO.30 of 1979 before the Commissioner, Hindu Religious Charitable Endowment Administration, who by order dated 30.8.1998, confirmed the order of the Deputy Commissioner and dismissed the appeal. The present suit in O.S.NO.1677 of 1981 came to be filed under Section 70 of the Act for the relief referred to above.

4. Sri Arasadi karpaga Vinayagar Temple (hereinafter referred to as suit temple) came into existence in or about the year 1850. The deity of God Vinayagar was enshrined in the temple and there were also deities of God Subramania and others. The temple is said to have been originally constructed and dedicated by the ancestors of Chinnakavaram Solayappa Mudaliar. The temple is situated in the premises at NO.120, Veeraraghava Mudali Street, Triplicane, Madras. In order to make proper management of the temple, a Deed of Indenture was entered into on 20.4.1911 between Chinnakavanam Solayappa Mudaliar, son of Chinnakavanam Arunagiri Mudaliar and Chinnakavanam Thathulinga Mualiar, son of the said Chinnakavanam Solayappa Mudaliar. As per this deed, all the estate, right and title which vested with the Chinnakavanam Solayappa Mudaliar shall devolve upon Chinnakavanam Thathulinga Mudaliar as Dharmakarthar of the Trustee of the said temple.

5. In reference to this temple, a suit in O.S.No.320 of 1912 was filed before the High Court of Judicature at Madras on the Original Side against C.Thathulinga Mudaliar praying for a declaration to declare that the plaintiff Foundation is a public religious trust, that the defendant has no right to be Dharmakarthar or Trustee of the said temple to finalise a scheme for election or appointment of Trustees of the said temple and for the management and administration of the affairs of the said temple.

6. The defendant Thathulinga Mudaliar in paragraph 7 of his written statement claimed to be the Dharmakarthar, besides claiming a hereditary title as per the deed executed by his father dated 20.4.1911. He had specifically pleaded as follows :

"The defendant denies all the allegations set out in the plaint that the temple is a private Trust. On the other hand, the defendant even during the lifetime of his father was always anxious to safeguard the interest of the temple as a public place of worship." (emphasis added)

7. The suit was decreed holding that the defendant as eldest member of the family was entitled to be Dharmakartha and that the Trustees were entitled to be Dharmakartha of the temple. It was declared as follows :

"I am of opinion that in order to prevent recurrence of any such attempts, it is necessary to declare that the temple and the properties were public endowments endowed largely by the public, though, of course, the members of this family have took active interest in the temple and probably were helpful in collecting subscription and adding to those properties and also helping the temple with their own funds." (emphasis added)

The present suit and the proceedings have to be considered in this background.

8. The line of succession of the present Hereditary Trustee can be set out as below :

Thathulinga Mudaliar (died-1954)

|
|
|

Sanju Mudaliar (died-1.9.58)

|
|
|

Shivalinga Mudaliar

|
|
|

Mani Mudaliar

9. The Genology of the family as set out in C.S.No.320 of 1912 is as follows :

Thambiappa
(Kandappa's brother)

|||
|| _____|____

Muthia Mudaliar Sister Kannappa ||
(died before 1810) | Arunagiri Subbraya
|| (died prior (Succeeded
| _____|_____ to 1882) in 1878)

daughter ||||
Gangathara Somu ||
(died (Pre-deceased ||
issueless Gangathara ||
in 1877) |||

|||
Chengalraya ||
(died after | ____|____
Soliyappa |||
became | Naraya Sundaram

trustee) | -naswami

| (defendant

| of Solayappa)

|

_____ | _____

|||

|||

Solayappa Krishnaaim Munisami

| (Preceded

Defendant Solayappa)

10. The case of the plaintiff is that the Temple is a private Temple put up for the benefit of the family and used by the members of the family for their religious worship, and accordingly, the public has no right to worship in the temple and the Hindu Religious and Charitable Endowment Department has no right upon the trustees to seek dismissal of their application to declare that the temple is a private temple. The suit came to be filed under Section 70 of the said Act.

11. The Commissioner, in his written statement inter alia, contended that the decision rendered by the High Court of Judicature in C.S. No.320 of 1912 was to the effect that the temple is a public one and the character of the temple is correctly confirmed in O.A.No.430 of 1951. The plaintiff has admitted that his forefathers were functioning only as hereditary trustees and there is no basis to contend that the temple is a private property of the plaintiff's family and that no oral or documentary evidence was placed before the Deputy Commissioner or the Commissioner to hold otherwise. It is further pleaded that the plaintiff having accepted that the persons were helping others as a hereditary trustee and having prayed for recognition as hereditary trustee, it is not open to him to seek for a declaration that the suit temple is a private temple. In other words, the defendant had claimed that the plaintiff is estopped from going back on the nature and character of the temple and the function of the hereditary trustees. A reply statement was filed by the plaintiff stating that the proceedings in C.S.No.320/1912 has culminated at the time when there was no Hindu Religious and Charitable Endowment Act and from the said proceedings, it is clear that the suit temple as a private one under the control of Hindu Religious and Charitable Endowment Department and the burden is on the Hindu Religious and Charitable Endowment Department to establish that the temple is a public temple.

12. The learned 17th Assistant Judge, City Civil Court, Chennai had framed the following issues :-

"1. Whether the plaintiff is entitled to seek for cancellation of the order passed by the Deputy Commissioner dated 30.8.1980?

2. Whether the suit temple is a private temple? and

3. whether the Hindu Religious and Charitable Endowment has jurisdiction over the same?"

13. Learned Judge who tried all the three issues together,

found that the suit temple is a private temple and that the hereditary trust is entitled to get the orders of the Deputy Commissioner cancelled. The present appeal is against the said judgment.

14. Mr.G.Sukumar, learned Special Government Pleader appearing on behalf of the Department, by referring to the various earlier orders, argued that the hereditary trustee,namely, C.S.Mani Mudaliar is estopped from raising the issue, the said question having been concluded in all the previous proceedings and before the Court and quasi judicial authorities and it is not open to the hereditary trustee to open the concluded issues.

15. Mr.K. Yamunan, learned counsel appearing on behalf of the respondent submits that the issue did not arise for consideration in the earlier proceedings and there cannot be res judicata on the question of law. According to him,the plaintiff is entitled in law to raise the issue of public character of the temple as well as the right of the management. It is argued that the learned Judge has considered the disputed facts and has given the finding as to the private nature of the temple and as to the right of the hereditary trustee and the judgment does not call for any interference.

16. We have heard the counsel for both sides and considered the matter carefully.

17. The points that arise for consideration are:

- (1) Whether the nature of the temple has been substantially in issue in the earlier suit C.S. No.320 of 1912 ?
- (2) Whether the plaintiff is estopped from reopening the issue ? (3) What is the nature of the suit temple ?

18. We may look into some of the relevant provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 which deal with the recognition and appointment of hereditary trust. SubSection 4 of Section 26 deals with the qualifications of the trustees. If a hereditary trustee becomes subject to any of the disqualifications mentioned in Sub Section (1), the Joint Commissioner or the Deputy Commissioner may supersede the trustee. Section 27 mandates the hereditary trustee of a religious institution to obey all lawful orders issued under the Provisions of the Act. Section 20 of the said Act speaks of the care required of a trustee and his powers. Section 53 empowers the Government to suspend, remove or dismiss trustees. Under Sub Section(2) of Section 53 the appropriate authority may suspend, remove or dismiss any trustee on the grounds set out therein. SubSection (4)of Section 53 empowers the appropriate authority to place the trustee under suspension and to appoint a fit person to discharge the duties and to perform the functions of the trustee. The Act, thus deals with the hereditary trustee their qualifications, appointment and control.

19. The petitioner's great grand father, viz. Thathulinga Mudaliar, had filed an application before the Deputy Commissioner for recognising his right as a hereditary trustee. The Deputy Commissioner, by his order dated 2.1.1952 in O.A.430 of 1951 (Ex.A.5) has passed the following Order :

"In view of Ex.P.1, the judgment in C.S.320 of 1912 on the file of the

Original Side of the High Court, Madras, it is crystal clear that the petitioner is the hereditary trustee of the temple. The suit was under Section 92 of Civil Procedure Code for a declaration that the temple was a public religious trust and that the petitioner had no right to be the Dharmakarthar or trustee of the temple and that if the plaintiff proved if he was one, he should be removed and other trustees should be appointed and that a scheme should be framed. His Lordship Mr. Justice Kumaraswami Sastriar held on the first issue, namely, "Is the defendant (present petitioner) not entitled to the office of the trustee" in defendant's favour and held that the petitioner had the right to be the Dharmakarthar of the temple. He had held that the eldest member of the petitioner's family was entitled to be Dharmakarthar. On the second issue, relating to the framing of a scheme, His Lordship held that it was not necessary to do so and it would be sufficient to direct the publication of an extract of the annual account of the income and expenditure. In these circumstances, the petitioner's claim to hereditary trustee is well founded. The petition is allowed.

Sd/-

N. Venkatarama Ayyar

Deputy Commissioner

H.R. & C.E. (Admn.) Dept.

dt. 29.1.59

Coimbatore. "

20. The above order proceeds on the accepted stand of the plaintiff's great grand father that the suit temple is a public temple and that he may be recognised as a hereditary trustee. The said application and his request for recognition itself pre-supposes that the temple is a public temple and was under the control and management of the Department. The order has become final.

21. In the present application before the Deputy Commissioner in O.A. No.21 of 1976, the plaintiff rested his claim on the deed of indenture dated 20.11.1911 and the judgment in C.S. No.320 of 1912. The Deputy Commissioner, in his order, found that the fact that the temple was under the management of erstwhile Board after its formation, and in any event, the order in O.A.No.430 of 1951, has become final. The petitioner has conceded that he is managing the accounts as per the directions of the Court in C.S.No.320 of 1912 and the accounts have been periodically verified by the Department officials who have signed in token of the same. He has also conceded that the Hundial is kept under lock and key, the amount is accounted by the hereditary trustees and the income is entered in the ledger, but there is decrease and increase in the hundial collections. The Deputy Commissioner has also noted the fact that the petitioner has been deliberately keeping away the order of declaration made in C.S.320 of 1912 by the High Court. It was found that the temple had already been declared as a public temple and none of the events subsequently have ever changed the character of the temple from its public nature. There are no bona fides in the application to declare the suit temple as a private temple. The Deputy Commissioner had also referred to all the ingredients required for a public temple viz. the public assemble in the temple in a large number on important days and they have to stand in queue

for hours to have the 'Dharshan' of the Lord; festivals were also being celebrated by public in a very grand scale by the individual 'Kattalaidhars', 'Abishekam' and 'Arathanai' and disbursement of 'Prasadam' were also being done regularly; and further, there is an inscription as to the performance of 'Kumbabhishekam' in the year 1954. He has clearly concluded as follows :

"So from all these evidences it is clear that the temple was and is being used as of right by the public as of right and the temple has already been declared as a public temple and none of the subsequent have ever changed the character of the temple from that of the public nature. If this temple cannot be treated as a temple defined under the Act, I feel that none also can ever be treated as a temple coming under the purview of the Act. Here the petitioner has not only refused to place all the documents with him that will lead to adverse inference in favour of the public nature, the decision of the 1912 case has become final in establishing the public nature. In the circumstances, I feel that only to pro-long the misappropriation of the income the petitioner has chosen to come to this Court with this petition and I find no reason to allow any of the petitioner's claim. In the result, the petitioner be and is hereby dismissed. Since the petitioner's own admission has shown that there is misappropriation of a huge income of the properties, it is for the concerned administration authorities under the Act to take effective action to prevent further misappropriation of this public temple and for making suitable arrangements by way of appointing an Executive Officer to set right the administration."

22. On Appeal, the Commissioner, while confirming the finding of the Deputy Commissioner, referred to a document dated 11.2.1951 wherein the then Collector had sold a piece of land adjacent to the temple land in favour of one P.S.Moothiah Mudaly. A reference to the document dated 20.4.1911 was made wherein Taulinga Mudaliar has been recognised as 'Dharmakartha' of the temple and it confirms the dedication of the temple. This refers to the management of the temple and not to the character of the temple. The Commissioner has referred to Exhibits which establish that there is public worship in the temple as of right and the performance of festivals in which the public freely participate and concluded that all the ingredients of a public temple are present. The records prove that the Deities are taken out in procession. The presence of Hundial in the temple is significant and it cuts the root of the appellant's claim that it is a private temple. The Commissioner commented upon the conduct of the appellant in not filing a copy of the judgment of the High Court in C.S.No.370 of 1912, though the appellant has referred to it in his application and his evidence. It was pointed out that the appellant was trying to suppress the materials before the him. For all these reasons, the Commissioner confirmed the findings of the Deputy Commissioner and dismissed the appeal.

23. On the fact that temple came into existence 70 years prior to the deed of indenture dated 20.4.1911, is not in dispute. The first document shows that there was dedication of the temple. The temple was dedicated to 'Vinayakar' and this document is executed by Chinnakavanam Solayappa Mudaliar in favour of his son Chinnakavanam Thathulinga Mudaliar recognising him as the hereditary Dharmakarhta. The document further

recognises that the office of the Trustee shall be hereditary. The order in O.A.430 of 1951 also recognises the right of succession to the Trusteeship and hence the plaintiff's great grand father was declared as a hereditary trustee. The document Ex.A.3 reiterates the absolute dedication of the property to the religious institution. The expression 'dedication' has been used at more than one place in Ex.A.3. It says that the temple is dedicated to Vinayagar and that it was originally constructed and dedicated by the ancestors and that from the time of the said dedication, the temple is managed by the ancestors. The document reiterates their right of management of the properties of the temple and therefore, we are of the view that the dedication is complete. This Court has recognised the public nature of the temple in the year 1912 and the fact that the plaintiff's great grand father has applied for recognition as a hereditary trustee. The following is the relevant extract from the judgment in C.S. No.320 of 1912 :-

"This is a suit filed by the plaintiff with the consent of the Advocate General under section 92 of the Civil Procedure Code for a declaration that the plaintiff foundation is a public religious trust and that the defendant has no right to be Dharmakarthar or trustee of the plaintiff temple, or if he is one, that he should be removed, for trustee being appointed and for a scheme to be settled in respect of the election or appointment of trustees and the management of the temple.

The plaintiff state that the temple of Karpaga Vinayagar Kovil situated in Triplicane was a public religious trust founded more than 70 years ago and dedicated to worship by the public, that the deity of Subramania was also enshrined in the temple, that the temple was resorted to by a large body of the worshippers and Ubavam and daily offerings were being conducted with the funds contributed by devotees and that the temple is possessed of properties, movable and immovable, to the value of Rs.40,000/-. They state that according to the usage of the institution, the management of the temple properties and affairs devolved on the Dharmakarthar nominated by the worshipping public represented by the Headman of Triplicane and the Kainkaryadars and Ubayakarars of the temple, that in 1881 Solayappa Mudaliar, the father of the defendants, was appointed by them and continued as Dharmakarthar till 1911, that Solayappa Mudali by a deed dated 20-4-1911 (Exb.M) alleging that the charity was founded by his ancestors and was a family trust purported to transfer and assign the Dharmakarthaship in favour of his son, the defendant in the suit and that after his death the defendant has taken upon himself the management of the temple and its affairs claiming to be Dharmakarthar by reason of the assignment by virtue of succession by hereditary to the Dharmakarthaship. They further state that the temple is a public trust, that the defendant's claim to hereditary Dharmakarthaship is unfounded and that Solayappa Mudali had no right to transfer the trusteeship by the document dated 20-4-1911. They also allege mismanagement by Solayappa Mudali and state that the defendant who is setting up hereditary Dharmakarthaship is disqualified from being a Dharmakarthar by reason of his assertion that the property is a family charity.

The defendant filed a written statement admitting that the trust was a public charitable trust but denying that, either according to the usage of the

institution or otherwise there was any election of the trustees as alleged in the plaint. He also denies that his father Solayappa was ever elected as a trustee and state that his predecessors in title have been hereditarily trustees of the temple which was founded by Muthiah Mudaliar. He gives the course of succession and claims to be the present Dharmakartha both under the Hindu law as hereditary Dharmakartha and by virtue of the appointment made by his father under the deed dated 20-4-1911. He denies that either he or his father were guilty of mismanagement, but on the contrary, states that they have spent large sums of money for the benefit of the temple.

The following issues were settled :

1. Is the defendant not entitled to the office of Trustee ?
2. Should a scheme be framed ?
3. To what relief are the plaintiffs entitled ?

First Issue : The title deeds of the various properties belonging to the temple have been filed by the plaintiffs as Exbs. A to N. These documents show, beyond all doubt, that the public gave certain properties to the temple, that certain properties were purchased by the trustee for the time being on behalf of the temple with funds belonging to the temple and that the Dharmakartha for the time being added to the properties. There can be little doubt that Muthiah Mudaliar who purchased property for the temple was instrumental in having the temple built, and it is further probable that the various successive Dharmakarthas contributed from their private funds and enriched the temple true extent. This however, would not make the temple a private charity which was founded by the ancestors of the defendant out of their own private funds and dedicated to the worship of the public.

As regards the course of succession, ..."

"But as I am satisfied that the usage was for the eldest member of first respondent partnership firm the family to be Dharmakartha, it will be sufficient for me to find the issue in the defendant's favour and to hold that he has at present the right to be the Dharmakartha of the temple.

Second Issue : This issue relates to the framing of a scheme as regards the temple. So far as the defendant's father is concerned, there can be little doubt that he set up that the temple was a private charity exclusively endowed with family funds and dedicated to the public worship and that he also attempted to mortgage the charity properties to the Mylapore Fund. The deed of nomination Exh. M. also is an attempt on his part to support his assertion of its having been a private institution entirely founded by the members of his family. I am of opinion that, in order to prevent a recurrence of any such attempts it is necessary to declare that the temple and the properties were public endowments endowed largely by the public, though of course, the members of this family took an active interest in the temple and probably were helpful in collecting subscription and adding to those properties and also helping the temple with their own funds. It is not necessary having regard to the extent of the properties of the temple and my findings on the first issue, to frame any elaborate scheme, but I think that it will be desirable to direct that the defendant to publish an abstract of the annual accounts showing the income and expenditure up to the 31st

December of each year, as also the temple properties, movable and immovable existing on that date. This account will be pasted on a conspicuous part of the temple. He will keep regular bound books consisting of a day book and a ledger which will be open to the inspection of the worshippers at any time between the 1 st and 31st January on their giving him at least three days notice, the inspection to take place in the temple itself. These two directions, I think, will be amply sufficient to safeguard the management and affairs of the temple." (emphasis added)

The finding of the High Court makes no room for doubt as to the nature of the temple, viz. That it is a public religious temple. As per the order Ex.A.5 dated 2.1.1952 in O.A.No.430 of 1951, C. Thathulinga Mudaliar's claim to be the hereditary trustee had been recognised by the Hindu Religious and Charitable Endowment Department and the fact that he had been under the supervision and control of the Department, cannot be disputed. The plaintiff had not produced sufficient materials before the Deputy Commissioner or the Commissioner to hold that the temple was not dedicated to the public and that it was a private temple.

24. The matter in issue, viz. the character of the temple, though not directly raised, but was substantially in issue in the litigation of the year 1912. That was a suit filed under Section 92 of the Code of Civil Procedure, wherein the predecessors of the plaintiff were the defendants and the claim was adjudicated upon. It was a composite decision holding as to the nature of the trust and temple. The question of res judicata was raised by the Department in all these proceedings and was answered against the plaintiff. It was not a decision on an abstract question of law unrelated to the facts of the case. The law as to the nature of the public religious institution has not changed; the same principles and requirements apply and therefore, the contention that there is a change in the law cannot be sustained. No new principles of law on the requirement as to the religious nature of a trust have been brought about. The suit of the year 1912 was instituted on behalf of the entire body of persons who were interested in the trust to vindicate the public rights. The plaintiff in that suit, represented the public at large which pre-supposes the existence of a public trust, religious or charitable in character. The suit having been permitted to be pursued, the right claimed in this suit between the plaintiff on the one hand and the Department on the other, is the same issue that was decided in the former suit.

25. As seen earlier, the question whether the plaintiff Foundation is a public religious trust and dedicated to worship by public was raised by the plaintiff in that suit. According to them, the management of the temple properties and its affairs devolved on the trustees nominated by the worshipping public and there is no right of transfer of trusteeship. The defendant, while admitting that the trust was a public charitable trust, claimed hereditaryship and succession to the right of Dharmakartha. While considering the issue on the office of trusteeship, the court has categorically found that the documents show, beyond all doubt, that the public gave certain properties to the temple, certain properties were purchased by the trustee for the time being on behalf of the temple with the funds

belonging to the temple and that the Dharmakartha added to these properties. The High Court also found that the contributions made by the Dharmakartha would not make the temple a private charity since it was founded by the ancestors of the defendant out of their own private funds and dedicated to the worship of the public. Thus, we could see that the issue whether the plaintiff temple is a public religious institution has been raised and decided in the suit as early as in 1912. Though there were no specific issue on this question of the public nature of the temple, the parties proceeded and accepted the nature of the temple and the court also found on evidence that it is a public religious institution. The plaintiff claims his right through his ancestors and if the temple and the trust were private, his ancestors ought to have raised the said issue. The court has finally decided the question. Alive to this fact, the plaintiff had deliberately kept away the pleadings and the judgment in the suit C.S. No.320 of 1912. The learned City Civil Court Judge, while referring to this point raised, did not go into the question of res judicata. We hold that the character of the temple having been decided in the suit earlier, the present claim is barred by res judicata.

26. The second submission that there is no evidence to show that it is a public temple and want of 'Gopuram', 'Prakaram', and 'Dwajastambam' should taken to mean that it is not a public temple. On facts, the evidence is let in on the side of the plaintiff to show that there was no 'Gopuram', 'Prakaram' or 'Dwajastambam'. P.W.1 has admitted that he had not shown the accounts to the Department officials, but, however, they have gone on their own for inspection and sent the accounts. He has admitted that his ancestors had made contributions as required under Section 92 of the Act and that the temple, like other religious institutions has to make annual contribution to the Government. This crucial admission made on behalf of the plaintiff really shows that the temple was under the control of the Department and that it was a public temple. P.W.2 and P.W.3 admit that there is 'Archana' in the temple and they used to pay the charges to the 'Archakars'. He has admitted in the cross examination that the temple is enclosed by walls on all four sides, that 'Bramorchavam' would be conducted. P.W.5 has admitted that public light camphor, offer coconut and there is a Hundial used for contribution; there are 'Archakars' in the temple; there are separate poojas conducted during 'Vinayagar Chathurthi'; He further says that for the purpose of offering 'Dharshan', no permission is required from the plaintiff. Thus, from the evidence it is seen that there is factual existence of a public temple and the public character of the temple is evident.

27. In A.I.R. 1936 Privy Council 258 (Raja) Jagadish Chandra Deo Dhabal Det VS Gour Hari Mahalo and others), it was held that the party raising a plea of res judicata is not entitled to go into the question of res judicata, when it has not been properly raised by the pleadings. It cannot be stated that in this case, the question was not raised. On the other hand, the very issue has been considered and answered.

28. In the judgment in A.I.R. 1929 Calcutta 163,(Rajini Kumar Mitra and others VS Admaddin Bhuiya), the Division Bench of the Calcutta High Court held that the bar of res judicata is one which does not affect the jurisdiction of the Court but is a plea in bar, which a party is at liberty to

waive. The Department has raised this question in their statement and pleaded.

29. In A.I.R. 1963 Supreme Court 1165 (1.Banarsi Das 2. Kundanlal Vs Kanshi Ram and others 2. Kundanlal and others 3. Munnalal and Others) it was held that an admission in so far as facts are concerned would bind the maker of the admission but not in so far as it relates to a question of law.

30. In A.I.R. 1991 Supreme Court 993 (Smt. Isabella Johnson Vs M.A.Susai (Dead) by Lrs.) the Supreme Court held that it is well settled that there can be no estoppel on a pure question of law and the question of jurisdiction is a pure question of law. Here, it is not a decision on law, but on facts. In Supreme Court Employees' Welfare Association vs. Union of India [A.I.R. 1990 S.C. 334], the Supreme Court has held that if the question of law is related to the fact in issue, even an erroneous decision on such question of law may operate as res judicata between the parties in a subsequent suit or proceedings if the cause of action is the same.

31. Applying the aforesaid decisions, Mr.Yamunan, learned counsel for the respondent, contended that the plea of res judicata had not been specifically raised and therefore, deemed to have been waived and hence, there can be no estoppel against law. But the said submission cannot be sustained. The question of res judicata was raised by the Department and the parties have proceeded on the existence of the judgment on the character of the temple. Since the Department was not a party, the plaintiff ought to have marked those documents. However, he had chosen not to furnish the same. Hence, we have called for original records of C.S. No.320 of 1912, including the pleadings, and we find from the pleadings and judgment therein that the question has been raised and decided. The plaintiff's forefathers have clearly admitted that the suit temple is dedicated to Lord Ganesh and that it is a public religious Institution. The Court has also held so. The plaintiff has also admitted the control of the Department ever since the appointment and recognition of the petitioner's grand father as the hereditary trustee under Ex.A.5. The fact that the Trustee himself has clearly recognised the dedication of the temple under Ex.A.1 and its management through hereditary trusteeship is made out and the judgment in C.S. No.320 of 1912 and the order of appointment of hereditary trusteeship in O.A. No.430 of 1951 concludes the issue against the plaintiff. On facts, it is seen that the temple has got all the ingredients of a public temple in having 'Prakaram', compound wall and public worship in large numbers, conducting ' Urchavams', appointment of 'Archakars' and the existence of Hundial etc. It is conceded that the Department was inspecting the collection of Hundials. From all the above, it is abundantly clear that the suit temple is a public temple.

32. For all these reasons, the judgment of the trial court is unsustainable, liable to be set aside and is accordingly set aside. The appeal is allowed. However, in the circumstances of the case, there will be no order as to costs. The connected C.M.Ps. are closed.

Index : Yes.

Internet : Yes.

Pal/ab

To

1. The Registrar,
City Civil Court,
Chennai-104.

2. The Record Keeper,
V.R. Section,
High Court,
Chennai-104 (With Records)

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